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No. 90-1431

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,
Petitioners,

v.

CHEVRON U.S.A. INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a claimed invasion of the California right of privacy based on a workplace search completely preempted by section 301 of the Labor Management Relations Act (29 U.S.C. § 185) where resolution of that claim is inextricably intertwined with the terms of the applicable collective bargaining agreement relating to the workplace rights and duties of the parties?

AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 29.1, respondent identifies the following as its parent corporation and subsidiaries (except wholly owned subsidiaries):

Chevron Corporation (parent)

Mozambique Gulf Oil Company (subsidiary).

In addition, respondent has an ownership interest in the following publicly traded companies:

Felix Oil Company

Horizon Gold Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner, David Stikes, was employed by Chevron as a maintenance worker at Chevron's Kettleman Hills production facility. At all times during the course of that employment, petitioner was represented by the International Union of Petroleum and Industrial Workers ("IUPIW"). The terms and conditions of his employment were established by a collective bargaining agreement between the IUPIW and Chevron. Pet. App. 4a.

Chevron had a written policy prohibiting unauthorized drugs, intoxicating beverages, firearms or other weapons at its Kettleman Hills facility. The policy provided that, as a safety precaution and to prevent theft of property, all persons and vehicles brought onto Company property were subject to search. Pet. App. 4a; Supp.ER 12.[1] The policy expressly provided that employees who refused to comply with a search request would be subject to discipline, up to and including discharge. Ibid. Petitioner acknowledged in writing having received and read a written notice of this policy. Ibid.

On July 1, 1987, in response to the discovery of what appeared to be drug paraphernalia in a Company-owned vehicle, Chevron conducted a security inspection of its employees at Kettleman Hills in accordance with its published policy. Pet. App. 4a; ER 55, ¶ 13; 56, ¶ 18. Petitioner, while permitting a search of his lunchpail, locker, and pockets, refused to permit Chevron's security representative to inspect his vehicle, which was parked on Company property. Id.; ER 55, ¶ 16. As a result, petitioner was terminated from employment.

The collective bargaining agreement recognizes Chevron's right to manage, direct and determine its workforce and to demote or discharge an employee for cause, and acknowledges the recognition of both Chevron and the IUPIW that safe working conditions and practices are essential in the prevention of personal injury and damage to equipment. Pet. App. 4a; Agreement (Supp.ER 18-82), Arts. II.C, IX.B, XX.A. In addition, the union agreed to encourage its members to work in a safe manner and "to cooperate with the Safety Program." Art. XX.A. The agreement also provides employees or the union with a three-step grievance procedure that culminates in binding third-party arbitration for the purpose of settling disputes. Arts. VII and VIII. A "just cause provision" of the agreement permits employees to protest a demotion or discharge. Art. I X.B.[2]

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[1] References to the ER and the Supp.ER are to the Excerpts and Supplemental Excerpts of Record filed in the court of appeals.

[2] Here the union did initiate a grievance on petitioner's behalf shortly after his discharge, and pursued it through the first two stages, but

B. Proceedings Below.

1. On March 23, 1988, petitioner filed an action against Chevron and the IUPIW in the United States District Court for the Northern District of California under section 301 of the Labor Management Relations Act ("LMRA") and the National Labor Relations Act, 29 U.S.C. § 151, et seq. (No. C 88 1000 CAL), in which he alleged that "Chevron's conduct, both in unilaterally promulgating its search-and-seizure policy and in firing David Stikes for refusing to submit to a search of his car pursuant to this policy, is in violation of the terms of the collective bargaining agreement attached hereto as Exhibit A." Supp.ER 9-10, ¶ 28. The complaint also states a claim against the IUPIW for breach of its duty of fair representation and an unfair labor practice. Supp.ER 10, ¶ 29. That action was stayed pending the Ninth Circuit's decision in the present case, and remains pending in the district court.

On the same day that he filed his federal section 301 action claiming that his discharge violated the collective bargaining agreement, petitioner filed the present action against Chevron in California state court alleging that the search and his subsequent discharge violated his right of privacy under Article I, section 1, of the California Constitution.[3] On April 22, 1988, Chevron removed petitioner's state court action to the United States District Court for the Northern District of California on the ground that petitioner's state claims were completely preempted by section 301 of the LMRA. The district court denied petitioner's motion for remand. The court then granted Chevron's motion for summary judgment on the ground that the action should be dismissed as completely preempted by federal law.

2. The court of appeals affirmed. The court explicitly recognized that, under this Court's decisions in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) and *Oklahoma Tax Commission*

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abandoned it before the final, binding arbitration stage was concluded. Supp.ER 2, ¶ 1: 10, ¶ 29; 83; 84.

[3] Petitioner also alleged other state law theories that, as the court of appeals held, were dependent on the disposition of his privacy claim. Pet. App. 12a.

v. Graham, 489 U.S. 838 (1989), "[a] federal defense, including the defense of preemption, may not form the basis of federal jurisdiction * * *." Pet. App. 5a. The court also recognized, however, that under the "complete preemption" doctrine, " 'the preemptive force of a statute [may be] so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule" ' " (id. at 6a, quoting *Caterpillar*, supra, 482 U.S. at 393), and that "section 301 of the LMRA is an example of a statute which has such a powerfully preclusive effect" (id. at 6a).

The court of appeals noted that this Court's decisions establish that section 301 completely preempts state law claims *either* that are founded on rights created by a collective bargaining agreement, *or* "which are 'substantially dependent on analysis of a collective bargaining agreement' " (id. at 7a, quoting *Caterpillar*, 482 U.S. at 394), and that to determine whether a claim substantially depends upon an interpretation of the collective bargaining agreement, "we must examine the elements of that claim to ascertain if any of the elements require a construction of the agreement" (id. at 7a).

The court then examined the elements of petitioner's privacy claim. It noted that in two previous decisions it had held that "a determination of a claim based on the California right to privacy would substantially depend upon an analysis of the collective bargaining agreement and would therefore be preempted." Id. at 8a.[4] The court concluded that petitioner's privacy claim "is inextricably intertwined with the collective bargaining agreement" because "a violation of California's constitutional right to privacy requires both that an individual have a 'personal and objectively reasonable expectation of privacy' and that the expectation 'has been infringed by an unreasonable * * * intrusion.' " Id. at 9a-10a.

> "Here, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the

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[4] *Utility Workers of America, Local 246 v. Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), certiorari denied, 489 U.S. 1078 (1989); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988).

> conditions of his employment enumerated in the collective bargaining agreement. *See In re Deborah*, 30 Cal.3d at 137 ('What constitutes a "reasonable" expectation of privacy depends on the circumstances and is measured by common habits in the use of domestic and business properties.' (citations omitted)). By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement." Id. at 10a.

As the court also recognized, the complete preemption issue presented in this case is fundamentally different from that in *Caterpillar*, because "unlike the CBA in *Caterpillar*, the CBA here does not provide a *defense* to Stikes' invasion of privacy claim. Rather, it is *part and parcel of the prima facie claim itself*, subjecting that claim to federal jurisdiction." Id. at 11a (emphasis added).

REASONS WHY THE PETITION SHOULD BE DENIED

In an effort to create an issue worthy of this Court's attention where none exists, the petition misstates the issues, mischaracterizes the opinion of the court of appeals, and misconstrues this Court's decisions considering the preemptive force of section 301. On the only issue presented—whether a claim that a *workplace* search violates the California right of privacy is substantially dependent on the provisions of the applicable collective bargaining agreement—there is no conflict among the circuits and no inconsistency with any decision of this Court. Nor does this case present any "extremely important question of federalism." Pet., p. 10. It is petitioner, not the Ninth Circuit, who has misunderstood and "disregarded" (Pet., p. 18) this Court's decisions and the reasons why the removal and subsequent dismissal of petitioner's complaint were clearly correct.

1. As the court of appeals recognized, section 301 of the LMRA is the leading example of a federal statute whose preemptive force is so extraordinary that it completely preempts both state law claims that are founded directly on rights created by a

collective bargaining agreement *and* those that are " 'substantially dependent on analysis of a collective bargaining agreement.' " *Caterpillar*, supra, 482 U.S. at 393-394, quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1987). Contrary to plaintiff's erroneous contention that "only state suits to *enforce* a CBA * * * 'arise under' section 301 and hence are removable" (Pet., p. 15), it is settled beyond any possible question that "[i]f the policies that animate section 301 are to be given their proper range * * * the preemptive effect of section 301 must extend beyond suits alleging contract violations." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). As this Court reaffirmed in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988):

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute." Id. at 406.

Thus, section 301 preemption extends beyond contract disputes to a claim framed in terms of state tort law if resolution of the claim is "inextricably intertwined with consideration of the terms of [a] labor contract." *Allis-Chalmers Corp. v. Lueck*, supra, 471 U.S. at 213.

2. The petition is based entirely on the erroneous suppositions that the provisions in the collective bargaining agreement are irrelevant to the determination of petitioner's claim that his privacy rights were violated by a workplace search, that his privacy claim could have been litigated without considering the provisions of the collective bargaining agreement (Pet., p. 7), and that the collective bargaining agreement could be relevant, if at all, only "defensively" to determine whether it constituted a "waiver" of petitioner's privacy claim. Pet., pp. 5, 7, 8, 9, 10, 15, 16, 17, 18. As the court of appeals held, none of these assertions is correct. Petitioner's pivotal claim that a federal "defense" of "waiver" provides no basis for removal is beside the point. Removal in this case was not based on any alleged defense of

waiver, but on the fact that, under clearly established law, petitioner's *own claim for relief* cannot be resolved without careful analysis of the provisions of the collective bargaining agreement that necessarily have an important bearing on the scope and reasonableness of his workplace privacy expectations.[5]

3. California law could not be clearer that in determining whether the right of privacy has been violated, a court must consider all of the facts and circumstances bearing on the weight and significance of the interest in disclosure, on the one hand, and the intrusion on reasonable privacy expectations, on the other. Under California law, "the right to privacy is not absolute" (*People v. Stritzinger*, 34 Cal.3d 505, 511 (1983)), and depends upon "striking a balance" between the competing interests in disclosure and privacy under all of the circumstances. *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 657-658 (1975); see, e.g., *Doyle v. State Bar*, 32 Cal.3d 12, 21 (1982); *Loder v. Municipal Court*, 17 Cal.3d 859, 864 (1976), certiorari denied, 429 U.S. 1109 (1977). That balance turns in significant part on "whether a person has exhibited a *reasonable* expectation of privacy" in the particular circumstances. *Burrows v. Superior Court*, 13 Cal.3d 238, 243 (1974) (emphasis added). Accord, *People ex rel. Franchise Tax Bd. v. Superior Court*, 164 Cal.App.3d 526, 540 (1985) ("The basic test of whether there has been a violation of the constitutional right of privacy is whether a person's personal and objectively reasonable expectation of privacy has been infringed * * *"); *In re Deborah C.*, 30 Cal.3d 125, 137 (1981) ("[w]hat constitutes a 'reasonable' expectation of privacy *depends on the circumstances and is measured by common habits in the use of domestic and business properties*") (emphasis added); *Alarcon v. Murphy*, 201 Cal.App.3d 1, 5 (1988); *Armenta v. Superior Court*, 61 Cal.App.3d 584, 588 (1976). Cf. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is under-

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[5] Similarly, petitioner's assertion that the Ninth Circuit's decision found preemption based on the "mere existence" of a collective bargaining agreement (Pet., second question presented and pp. 7, 20) is specious.

stood to differ according to context"). And, foremost among the circumstances bearing on the strength and reasonability of the interests in privacy and disclosure in the context of a workplace search are the provisions of the applicable collective bargaining agreement.

4. Petitioner's assertion that the Ninth Circuit "focus[ed] on the [defense of] waiver * * * not the claims pleaded by petitioner" (Pet., p. 9) is clearly wrong. The court of appeals explicitly reaffirmed that removal may not be based solely on the existence of a federal preemption defense. Supra, p. 4. The point, rather, is that the collective bargaining agreement defines and governs the workplace relationship between the parties and therefore necessarily has an important bearing on the interests of the parties and the scope of the reasonable expectations against which any privacy rights enjoyed by petitioner are required to be measured. Pet. App. 9a-10a. The elements of plaintiff's own claim for relief therefore brought the provisions of the collective bargaining agreement into play. A court would have to interpret the agreement to determine the legitimate interests and expectations of Chevron and its employees and to draw the appropriate balance between them in the context of this workplace search.

5. The state claims in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) (Pet., pp. 14-16) arose in an entirely different context. The plaintiffs in *Caterpillar* filed an action in state court in which they elected to rely on contractual rights that arose while they were in non-union management positions and before they were demoted to positions covered by the collective bargaining agreement. The collective bargaining agreement was interjected into the suit only by way of the employer's defense—i.e., that after plaintiffs were demoted, the collective bargaining agreement somehow superseded any contract rights arising earlier. *Caterpillar*, supra, 482 U.S. at 394-397. By contrast, the *only* contract that governed petitioner's employment relationship with Chevron was the collective bargaining agreement. And because petitioner's affirmative claim for relief itself necessarily involved interpretation of that agreement, this action was properly removed, and subsequently dismissed, as completely preempted by section 301.

Petitioner's reliance on *Caterpillar* again rests on the mischaracterization of the issue as whether the collective bargaining agreement in this case constituted a "waiver" of plaintiff's privacy rights. However, as previously discussed, reference to the collective bargaining agreement is required in this case, not to resolve a defense, but to determine plaintiff's own claim for relief. As the court of appeals explained, "[h]ere, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement. * * * By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement." Pet. App. 10a.

6. Petitioner's further contention that the decision of the court of appeals would permit removal even if the collective bargaining agreement, properly construed, would not defeat the reasonable privacy expectations of the employee (Pet., pp. 11-12, 23, 25) misses the central point of this Court's section 301 preemption decisions. This Court has repeatedly held that any state law claim that is "substantially dependent" upon the *process* of construing a collective bargaining agreement is completely preempted by section 301, regardless of the outcome of that process, because of the overriding necessity for uniformity in the application of federal labor law. See, e.g., *Allis-Chalmers*, supra, 471 U.S. at 210, 213. In this case, to determine whether the collective bargaining agreement's provisions relating to the workplace rights and obligations of the employer and the employees do or do not strengthen or undermine the reasonable privacy expectations of the employees and the countervailing interest of the employer in disclosure, the provisions of the agreement must first be interpreted and applied.[6] Where a state law claim is substan-

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[6] This is well illustrated by petitioner's "hypotheticals" (Pet., pp. 11-12) that, alternatively, posit that the collective bargaining agreement "as reasonably construed" does not bear on privacy; that the agreement's "actual meaning tilts slightly in favor of the employer"; and that the agreement should be construed to require the employer to adhere to state privacy protections. Pet., pp. 11, 12. Similarly, peti-

tially dependent on such a process, it is completely preempted. This does not leave the employee remediless or "completely eviscerate" (Pet., p. 25) protections of unionized employees. The employee's remedy instead lies under the provisions of the applicable collective bargaining agreement, as demonstrated by petitioner's pending federal action alleging that his discharge violated section 301. Supra, p. 3.[7]

Nor does the decision below in any way conflict with *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). Pet., pp. 19-21. To the contrary, *Lingle* explicitly reaffirms *Allis-Chalmers*' central premise—that preemption is dependent upon whether the asserted claim, regardless of how it is framed, must be resolved with reference to the collective bargaining agreement. 471 U.S. at 211. In *Lingle*, this Court found that resolution of plaintiff's claim of retaliatory discharge for filing a workers' compensation claim required no analysis of the collective bargaining agreement and, indeed, was completely " 'independent' of the collective bargaining agreement." 486 U.S. at 407. By contrast, in this case, the Ninth Circuit correctly concluded that the California privacy claim was "inextricably intertwined" with the CBA. Pet. App. 9a. While petitioner asserts (contrary to clear authority)[8] that California courts would hold that the right of privacy cannot be "waived " in collective bargaining, this Court in *Lingle* explicitly concluded that even where a right is claimed to be

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tioner's second "question presented" asserts that the Ninth Circuit's decision is erroneous because it finds preemption even though a court has not determined "the actual way in which the CBA applies to the specific conduct that forms the basis of the state law claim."

[7] Moreover, petitioner's exaggerated arguments disregard that under this court's decisions (and under the decision below), *only* claims that are substantially dependent on the terms of a collective bargaining agreement are preempted. All other state law protections and regulations of working conditions are unaffected.

[8] *Luck v. Southern Pacific Transportation Co.*, 218 Cal.App.3d 1, 28 (1990), certiorari denied 111 S.Ct. 344 (1990) (consent to drug testing under a CBA would be lawful); *Laws v. Calmat*, supra, 852 F.2d at 433; *Utility Workers of America v. Southern Cal. Edison*, supra, 852 F.2d 1086 (drug testing does not implicate "nonnegotiable state-law rights").

"non-negotiable," complete preemption still occurs where interpretation of the bargaining agreement is required for its determination. 486 U.S. at 408, n. 7. As the court of appeals in the present case correctly held in rejecting petitioner's *Pullman* abstention argument:

> "Appellant nevertheless reasons that if the California courts were to deem the right to privacy nonnegotiable, the federal courts would not have to address the question of whether the LMRA preempts the privacy right. The right to privacy under California law, however, is based in major part upon the parties' reasonable expectations and these, of necessity, involve the working conditions agreed upon in the collective bargaining agreement. Thus, even if the California courts were to find the privacy right non-waiveable, the right is not absolute and its scope would involve consideration and possible interpretation of the collective bargaining agreement. Pullman Abstention, therefore, is not appropriate for this reason as well and the district court properly refused to abstain." Pet. App. 12a-13a.

7. There is also no conflict in the circuits. As the Court of Appeals for the First Circuit recognized in an analogous case alleging an invasion of the Massachusetts privacy right, it is clear that California courts "would view the collective bargaining process as an appropriate datum in constructing the needed balance between the worker's privacy rights and the legitimate concerns of management." *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 117 (1st Cir. 1988), certiorari denied 490 U.S. 1107 (1989), citing *Laws v. Calmat*, supra, 852 F.2d at 433, 434, n. 5, and *Utility Workers of America, Local 246 v. Southern California Edison Co.*, supra, 852 F.2d at 1086. Other circuits as well have held that section 301 completely preempts employee challenges to the validity of employer actions involving employee drug testing and searches under state law. See, e.g., *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), certiorari denied 110 S.Ct. 1133 (1990) (privacy claim based upon search of person and request to search automobile); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (workplace search cases are "grist for the mill of grievance procedures and arbitration").

There are no reported cases to the contrary. The decisions referred to by petitioner as allegedly creating a conflict (Pet., pp. 16, 22-23) are completely inapposite. None involved a claimed privacy intrusion, and, in stark contrast to the present case, none would have required resort to the provisions of the collective bargaining agreement to determine whether the plaintiff had established a right to relief.[9]

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[9] For example, *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989), certiorari denied 110 S.Ct. 539 (1989); *Pantoja v. Texas Gas and Transmission Corp.*, 890 F.2d 955 (7th Cir. 1989), certiorari denied 110 S.Ct. 3272 (1990); *Makray v. Sara Lee Corp.*, 736 F.Supp. 793 (N.D.Ill. 1990); *Miller v. Fairchild Industries, Inc.*, 668 F.Supp. 461 (D.Md. 1987); *Brown v. Holiday Stationstores, Inc.*, 723 F.Supp. 396 (D.Minn. 1989); and *Intern. Ass'n of Machinists by McCadden v. GE Co.*, 713 F.Supp. 547 (N.D.N.Y. 1989) all involved claims for retaliatory discharge or statutory discrimination that , like the claim addressed by this Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), were not in any way dependent on the provisions of the collective bargaining agreement, and therefore were not preempted. The holdings in these cases are entirely consistent with those of the Ninth Circuit, which also treats statutory discrimination claims as not preempted by section 301. See e.g., *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 644 (9th Cir. 1989); *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1286-1287 (9th Cir. 1989); *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514, 1517 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543, 550 (9th Cir. 1988). None of petitioner's cases involves a claim that, like the right of privacy in this case, is substantially dependent upon the provisions of a collective bargaining agreement.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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